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# Supreme Court of the United States

October Term, 1997

**OLLIE MASTRONARDI,**
*Petitioner,*

v.

**THE STATE OF OHIO,**
*Respondent.*

**Petition For A Writ Of Certiorari**
**To The Supreme Court of Ohio**

## PETITION FOR WRIT OF CERTIORARI
**with Appendix**

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120 pp

## QUESTIONS PRESENTED FOR REVIEW

I. Whether Petitioner's right to due process of law was violated when the trial court permitted the state prosecutor to use grand jury transcript only available to him for cross-examination purposes.

II. Whether Petitioner's right to due process was violated when the prosecution failed to preserve evidence and/or altered evidence so as not to allow the Petitioner the right to examine and evaluate evidence.

III. Whether Petitioner's right to presentment or indictment by grand jury was violated when the jury was presented with an unindicted additional finding not part of the indictment.

IV. Whether the Petitioner's Fourth Amendment rights were violated when selected custodial pre

Miranda remarks were admitted into evidence at his trial.

V. Whether the Petitioner's rights to due process of law were violated when the trial court accepted inconsistent jury verdicts.

VI. Whether the Petitioner's rights to due process of law was violated when the state was permitted to prosecute Petitioner for multiple offenses arising from the same conduct.

## LIST OF PARTIES TO PROCEEDINGS AND COURT BELOW

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Respondent: Kevin Baxter
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## OPINIONS AND ORDERS ENTERED IN THE CASE

In May 1996 Petitioner was convicted in State Court of Vehicular Homicide and Involuntary Manslaughter. A copy of his Sentencing Order appears in the Appendix at Section C. He appealed his conviction to the Court of Appeals of Erie County, Ohio and that Court rendered an Opinion and Journal Entry on December 5, 1997. A copy of that Opinion and Journal Entry appears in the Appendix at Section B. Further he appealed his case to the Supreme Court of Ohio which Court rendered an opinion on April 1, 1998 denying leave to appeal. A copy of that Entry appears in the Appendix at Section A.

## STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under the provisions of 28 U.S.C. 1257 and Rule 10(B) and (C), Supreme Court Rules. The judgment of the Ohio Supreme Court from which this appeal was taken is dated April 1, 1998.

## CONSTITUTIONAL PROVISIONS INVOLVED

This case involves five (5) Amendments to the United States Constitution:

(A) The Fourth Amendment, which provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place

to be searched, and the persons or things to be seized.

(B) The Fifth Amendment, which provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken from public use without just compensation.

(C) The Sixth Amendment, which provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have assistance of counsel for his defense.

(D) The Eighth Amendment, which provides:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

(E) The Fourteenth Amendment, which provides in part:

No state shall make or enforce any law which shall abridge the

privilege or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## STATUTES INVOLVED

Ohio Revised Code 2903.04
(See Appendix at Section F)
Ohio Revised Code 2903.06
(See Appendix at Section F)
Ohio Revised Code 2903.07
(See Appendix at Section F)

## PETITION FOR WRIT OF CERTIORARI

The Petitioner, OLLIE MASTRONARDI, respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the Supreme Court of Ohio decided on April 1, 1998.

Respectfully submitted,

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## STATEMENT OF THE CASE

On July 7, 1995 the Erie County, Ohio grand jury returned a two (2) count indictment naming Petitioner and alleging violations of Ohio Revised Code 2903.06 (Aggravated Vehicular Homicide) and Ohio Revised Code 2903.04(B) (Involuntary Manslaughter). The indictment, appearing in Appendix at Section D, did not contain a specification that Petitioner was under the influence of alcohol.

In May of 1996 Petitioner was found not guilty of Aggravated Vehicular Homicide but guilty of the lesser included offense of Vehicular Homicide and further was found guilty of an additional finding presented by the Court to the jury that the Petitioner was under the influence of alcohol and further Petitioner was found guilty of Involuntary Manslaughter. He was sentenced to 5 – 10 years on the Involuntary Manslaughter conviction and 6 months on the Vehicular Homicide conviction to be served concurrently. A copy of

the Sentencing Order of the Trial Court appears in the Appendix at Section C.

The salient facts of this case are these. Scott Brabander was on his family boat with his Father, Mother and a friend. This boat was idling parallel to a dock on the eastern side of Kelly's Island, Ohio, an island in Lake Erie. The boat was waiting to dock. At about 3:00 p.m. Petitioner's boat was spotted traveling fast about ¼ mile from the dock. Petitioner's boat slowed as it approached the Brabander's boat, however, it apparently hit the port side of the Brabander boat, flew over and landed on the other side. Scott Brabander's Mother and Father, as well as his friend, escaped unharmed. However, Scott Brabander died as a result of blunt force to his back. Following the collision the Petitioner was taken into custody by the Ohio Department of Natural Resources Agent. Certain field sobriety tests were administered to Petitioner and he declined a breath test. However, blood was drawn which was found to be negative for alcohol and/or drugs.

In the Appendix herein, appearing at Section B, is the Court of Appeals Opinion and Judgment Entry. In that Opinion and Judgment Entry is a more detailed description of the facts of this case.

After being convicted and sentenced in May of 1996 Petitioner filed an appeal in the Court of Appeals of Erie County, Ohio. The Court of Appeals rendered its Decision in December of 1997 (See Appendix at Section B). Petitioner then timely filed a Notice of Appeal to the Supreme Court of Ohio and on April 1, 1998 the Supreme Court of Ohio denied leave to appeal (See Appendix Section A).

Each and every one of the issues presented here was timely objected to at the trial court level and assigned as Assignments of Error in the Court of Appeals in Petitioner's direct appeal. Question No. I regarding the use of grand jury testimony was originally assigned as error number ten in Petitioner's direct appeal. (See Appendix at Section B).

Issue Number II involving the failure to preserve evidence and altering evidence is contained in Assignment of Error Number Twelve in the Court of Appeals Decision. (See Appendix at Section B). Mike Benfer a mechanic was asked by the Ohio Department of Natural Resources was asked to determine if there was a problem with the throttles of the Petitioner's boat. While he was working on the boat he started the engines and moved the throttles and drives to test their operation. He then tightened the cable.

The third issue presented here regarding the unindicted additional finding was assigned as error in the Court of Appeals in Assignment of Error Number Six (See Appendix at Section B).

The issues presented in Number V having to do with the custodial pre-Miranda warnings were assigned as error in the Court of Appeals as Assignment of Error Number two (See Appendix at Section B). In addition this evidence was subject to a pre-trial suppression hearing. In this case

Petitioner did not argue that the content of his responses was incriminating. The only incriminating aspect of Petitioner's responses was the manner in which he spoke them: that is he sang the ABC's and hesitated while counting. The Court therefore interpreted Petitioner's case as not being a communication citing Pennsylvania v. Muniz (1990), 496 U.S. 582 at 591.

Issue Number VI involving the inconsistent verdicts was assigned as error number five in the Court of Appeals Decision (See Appendix at Section B). Issue Number VII involving the multiplicity in the indictment was assigned as error number nine in the Court of Appeals.

In summary all of the issues presented here have been timely and properly raised before the state court. All of the issues were fully litigated before the trial court and the Court of Appeals and at no time has the state argued otherwise.

## ARGUMENT

### I.

Whether Petitioner's right to due process of law was violated when the trial court permitted the state prosecutor to use grand jury transcript only available to him for cross-examination purposes.

Ohio law provides in Ohio Criminal Rule 6(E) (See Appendix at Section H) in relevant part that deliberations of the grand jury and the vote of any grand jurors shall not be disclosed. Disclosure or other matters before the grand jury may be made to the prosecuting attorney for use in the performance of his duties a . . . prosecuting attorney . . . may disclose matters . . . but may disclose such matters only when so directed by the Court. The sanctity and secrecy of grand jury proceedings has been historically and jealously guarded by the Ohio courts. State v. Tenbrook (1997), 34 Ohio Misc.2d 14 at 15. See

also State v. Grewell (1989), 45 Ohio St.3d 4 at 7. Ohio courts have recognized that "the disclosure of grand jury testimony is an exception to the historical rule of secrecy that protects grand jury proceedings and he who would stripe the mantel of secrecy from the proceedings must bear the burden of showing the need for such action. State v. Roberts (1976), 50 Ohio App.2d 237 at 247.

In this case the prosecutor violated Ohio law by obtaining a transcript of secret grand jury proceedings without the direction of the Court. He then used this transcript to cross-examine witnesses. Petitioner feels that this is a violation of his due process rights as guaranteed by the Fifth, Sixth and Fourteenth Amendments. The Ohio Courts failed to take into consideration Pittsburgh Plate Glass Company v. United States (1959), 360 U.S. 395 and failed to protect the historical rule of secrecy inherent in grand jury proceedings.

II.

Whether Petitioner's right to due process was violated when the prosecution failed to preserve evidence and/or altered evidence so as not to allow the Petitioner the right to examine and evaluate evidence.

This Court in Arizona v. Youngblood (1988), 488 U.S. 51 held that the due process clause of the Fourteenth Amendment as interpreted in Brady makes good or bad faith of the state irrelevant when the state fails to disclose to the defendant material exculpatory evidence.

The Youngblood case was recognized by the Ohio Courts in State v. Lewis (1990), 70 Ohio App.3d 624 at 633. Further this Court in United States v. Bagley (1984), 473 U.S. 667 held that evidence shall be determined material only if there is a reasonable probably that had the evidence been disclosed to the defense the result of the proceeding would have been different.

Petitioner believes that the Ohio courts failed to take this Court's directive in consideration in ruling upon this issue. Petitioner's defense centered around the condition and position of the throttles. When Mr. Benfer altered the position of the throttles the state failed to preserve the integrity of the evidence and thus the Petitioner was denied a material part of his defense. Petitioner made no claim or allegation of criminal wrong doing or no claim of bad faith.

III.

Whether Petitioner's right to presentment or indictment by grand jury was violated when the jury was presented with an unindicted additional finding not part of the indictment.

Petitioner feels that his constitutional rights were violated when the jury was presented with "an additional finding" without presentment or indictment by grand

jury. Both the Fifth Amendment of the United States Constitution and Article I, Section 10 of the Ohio Constitution provide that no person shall be held to answer for a capital or otherwise infamous crime unless on presentment or indictment of a grand jury. The state court basically found that this was not a specification or an amendment to the indictment but rather a special finding. While there is no provision under state law for special findings Petitioner feels that this is a issue of presentment and feels that his constitutional rights were violated.

IV.

Whether the Petitioner's Fourth Amendment rights were violated when selected custodial pre Miranda remarks were admitted into evidence at his trial.

This Court has held that the admission of cognitive statements made during field sobriety testing violated a defendant's Fifth Amendment right

against self-incrimination, In Pennsylvania v. Muniz (1990), 496 U.S. 592. In this case Petitioner's constitutional rights were violated when questions were used to determine his ability to think and analyze in an impaired state and responses were then evaluated by the officers to determine his state of sobriety. The Court of Appeals Decision in this case held that with respect to an individual privilege against self-incrimination "the privilege is a bar against compelling communications or testimony but that compulsion which makes a suspect or accused a source of real or physical evidence does not violate it" and cites Pennsylvania v. Muniz, supra. Accordingly, the Court of Appeals goes on to say physical characteristics such as ones manner of speech that is slurred speech, blood alcohol level, fingerprints, photographs, handwriting, voice, stance, walk or jester are not testimonial responses to which the privilege applies and against cites Muniz. The Court of Appeals went on to say that had Petitioner been unable to count then perhaps his responses

would have been incriminating, however, the content of Petitioner's responses was accurate. The only incriminating aspect of Petitioner's responses was the manner in which he spoke them: that is he sang the ABC's and hesitated. Therefore the Court of Appeals found that Petitioner's rights were not violated and that the trial court had correctly denied his motion to suppress.

Petitioner feels that the state courts here have misinterpreted the Muniz decision. The Petitioner feels that his singing the ABC's does amount to a response to a custodial interrogation and therefore fits within the prohibition of Muniz.

V.

Whether the Petitioner's rights to due process of law were violated when the trial court accepted inconsistent jury verdicts.

On May 10, 1996 the jury in this case returned a verdict finding Petitioner not guilty of Aggravated

Vehicular Homicide. The mental culpability requirement for Aggravated Vehicular Homicide under Ohio law is recklessness. The jury found Petitioner guilty of the lesser included offense of Vehicular Homicide which crime requires a mental culpability of negligence. In looking at this verdict one would think that the jury in this case determined that Petitioner has acted negligently under the facts and circumstances of this case. However, the jury in addition found the Petitioner guilty of Involuntary Manslaughter which has a mental culpability requirement of recklessness.

The Ohio State Supreme Court in State v. Koss (1990), 49 Ohio St.3d 213 at 219 overruled a claim that inherently inconsistent verdicts are violations of Ohio law.

The Court of Appeals Decision on page 22 of the Opinion cites State v. Adams (1978), 53 Ohio St.2d 223 which holds that several counts of indictment are not interdependent and that inconsistency in a verdict does not arise out of inconsistent responses to

different counts. The Court cites United State v. Powell (1984), 469 U.S. 57 at 65.

It is very difficult to imagine a situation where there is inconsistency within the count. In this case the inconsistency is blatant. On one hand the jury finds the Petitioner negligent and on the other hand the jury finds the Petitioner reckless. Petitioner feels that the jury in this case lost its way.

In Powell, supra, this Court felt that the criminal defendant was afforded protection against jury irrationality by the independent review of the sufficiency of the evidence undertaken by the trial court and appellate court. Powell, supra, at 67. Petitioner contends that in this case there was no meaningful evaluation of the sufficiency of the evidence.

VI.

Whether the Petitioner's rights to due process of law was violated when the state was permitted to prosecute Petitioner for multiple offenses arising from the same conduct.

The basis of this issue is that the interplay between the two Ohio Revised Code Sections creates a situation which becomes confusing to a jury and creates an atmosphere which results in the unconstitutional detriment of an individual who stands accused of both crimes at the same time. Petitioner is asked to defend whether or not he was reckless or defend whether he was negligent or to defend that he had no criminal culpability. The confusion became apparent when the jury returned a verdict on one count citing Petitioner's negligence and on another count citing his recklessness. The state court cited State v. Chippendale (1990), 52 Ohio St.3d 118. In that case the Ohio State Supreme Court held that one can be charged with both

Involuntary Manslaughter and Aggravated Vehicular Homicide but if the allegations arose from a single series of events Petitioner could only be sentenced to one of those counts. Ohio has a statutory scheme wherein special provisions prevail over general provisions. However, the Chippendale Court found that the legislatures' intent was manifest that the general and special provisions be applied co-extensively and where the provisions are allied offenses of similar import then the prosecution may charge on and try both but the defendant may be sentenced for only one of those offenses.

Petitioner feels that the constitutional problem here is that the prosecutor is given the apparent authority to convert both crimes to felonies by charging Petitioner with Involuntary Manslaughter. The prosecution in effect writes out the misdemeanor from the law by charging Petitioner with Involuntary Manslaughter. It is not clear in this case as Chippendale stated that it is the legislative intent that general and

specific provisions be applied co-extensively.

## CONCLUSION

For the reasons stated herein, Petitioner respectfully prays that this Court grant his Petition.

Respectfully submitted,

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